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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DISCOVISION ASSOCIATES, a California  
partnership,

Plaintiff,

v.

TOSHIBA CORPORATION, a Japanese  
corporation,

Defendant.

No. 08 Civ. 3693 (HB)

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH  
THERE IS NO GENUINE DISPUTE PURSUANT TO LOCAL CIVIL RULE 56.1**

Pursuant to Rule 56.1 of the Local Civil Rules of this Court, Plaintiff Discovision Associates (“DVA”), by its attorneys Hughes Hubbard & Reed LLP, hereby submits the following statement of material facts as to which they contend there is no genuine issue to be tried:

1. On or about March 31, 2003, DVA and Defendant Toshiba Corporation (“Toshiba”) entered into a Non-Exclusive Limited Worldwide Patent License Agreement for Playback and Recording Products (the “License Agreement”). (Declaration of Dale Tarzia, dated May 8, 2008 (“Tarzia Decl.”), Ex. 1.)

2. Section 6.7 of the License Agreement provides for periodic “audits”<sup>1</sup> of Toshiba’s records regarding the determination of royalties payable under the License Agreement:

[Toshiba] shall keep separate records in sufficient detail to permit the determination of royalties payable hereunder. At the request of DVA, [Toshiba] shall permit independent auditors or technical consultants selected by DVA to examine during ordinary business hours once in each calendar year such records and other documents as may be necessary to verify or determine royalties paid or payable under this Agreement. Such auditors or technical consultants shall be instructed to report to DVA only the amount of royalties due and payable. If no request for examination of such records for any particular accounting period has been made by DVA within three (3) years after the end of said period, the right to examine such records for said period, and the obligation to keep such records for said period, will terminate.

3. In the summer 2006, DVA engaged Deloitte & Touche LLP (“Deloitte”) to inspect Toshiba’s books and records pursuant to Section 6.7 of the License Agreement. (Tarzia Decl. ¶ 2.)

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1. The License Agreement provides for examination of Toshiba’s books and records by an independent specialist to assess whether Toshiba is properly reporting and paying royalties due DVA. These procedures are described as an “audit” in the License Agreement, but are known as “royalty inspections” in the accounting industry since they do not constitute a financial statement audit in accordance with Generally Accepted Auditing Standards. (Tarzia Decl. ¶ 2.) These procedures are referred to hereinafter as a “royalty inspection.”

4. On or about August 15, 2006, DVA informed Toshiba that it elected to exercise its royalty inspection rights and had selected Deloitte to do the work. (Tarzia Decl. ¶ 2 & Ex. 2.)

5. On or about September 5, 2006, Deloitte wrote to Toshiba stating that it was authorized to commence the royalty inspection. (Tarzia Decl. ¶ 3 & Ex. 3.)

6. On or about September 7, 2006, Deloitte provided Toshiba with a list of initial documents and information necessary for the royalty inspection. (Tarzia Decl. ¶ 4 & Ex. 4.)

7. Toshiba refused to provide any of the documents and information requested by Deloitte. (Tarzia Decl. ¶ 5.)

8. To date, Toshiba has not made any information available to Deloitte. (Tarzia Decl. ¶ 5.)

Dated: New York, New York  
May 28, 2008

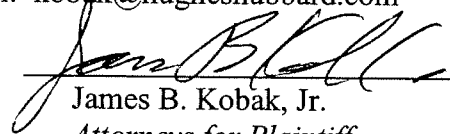
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By:



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*Discovision Associates*

To: Frank J. Colucci  
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*Attorneys for Defendant Toshiba Corporation*

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**AFFIDAVIT OF SERVICE**

----- X  
STATE OF NEW YORK.....)

ss.:


COUNTY OF NEW YORK....)

Margaret Murphy, being duly sworn, deposes and says that I am over the age of eighteen years, not a party to this action, and am in the employ of Hughes Hubbard & Reed LLP, attorneys for Plaintiff herein.


That on May 28, 2008, at approximately 3:15 p.m., deponent served  
**NOTICE OF MOTION, MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT, PLAINTIFF'S STATEMENT OF  
MATERIAL FACTS, and DECLARATION OF DALE TARZIA IN SUPPORT,** by hand  
upon:

Frank J. Colucci  
Colucci & Umans  
218 East 50<sup>th</sup> Street  
New York, New York 10022-7681

By personally leaving true copies with a person of suitable age and discretion who stated that he was authorized to accept service on behalf of Colucci & Umans.

  
\_\_\_\_\_  
MARGARET MURPHY  
License Number 1267699

Sworn to before me this  
28<sup>th</sup> day of May, 2008

  
\_\_\_\_\_  
Notary Public

PATRICIA E. SMITH  
Notary Public, State of New York  
No. 1SM4796951  
Qualified in Richmond County  
Certificate Filed in New York County  
Commission Expires March 30, 20 11